IN THE HIGH COURT OF JUDICATURE
AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL (ST) NO.9874 OF 2007
WITH
CIVIL APPLICATION NO. 2453 OF 2007

Shashikant Nirgudkar ...Appellant
Vs.
MHADA & Anr. ...Respondents

Mr.P.G.Karande , Advocate for Appellant
Mr. S.N. Gawade, A.G.P for Respondent No.1.
Mrs. Sudha Shreedharan, Advocate for Respondent No.2

CORAM: SMT.ROSHAN DALVI,J.
DATED: 19TH JUNE, 2007

P.C.

1. The above Civil Application is for continuation of the interim stay which was initially granted by the learned trial Court – the Bombay City Civil and Sessions Court during the pendency of the suit and which was continued since.

2. Advocates of the parties are heard at length. The copies of the evidence as well as the documents relied upon by the parties are produced.

3. The Appellant's suit has been dismissed, from which order this Appeal is filed. The Appellant has applied for mandatory reliefs in the suit. He has been granted a prohibitory injunction which has continued till today. Under the circumstances and since all the records have been placed before the Court, the Appeal is disposed off at the stage of admission itself.

4. The case of the Appellant is that he has been in possession of the Suit premises and the suit premises has been wrongfully demolished by MHADA without giving him notice and a right of hearing and hence, the MHADA, failing which he, should be directed to reconstruct the suit premises.

5. The suit premises is between two premises of other parties. To understand the Appellant's case of what is the suit premises for which he is claiming his rights, the Appellant as well as the RespondentNo.2 were directed to produce photographs of such premises. The photographs are seen.

6. The suit premises is not a premises. It is an open land between two premises which has a tarpolene to serve as a roof. The two sides of the premises are formed by the walls

of the two adjacent premises. Two other sides are open. The premises is not enclosed within 4 walls and is not covered by a roof of any permanent nature. The photographs show two sides of the premises completely open. The two sides which are closed are, as aforesaid, by the walls of the two adjoining structures.

7. The land below the premises claimed by the Plaintiff belongs to MHADA, Respondent No.1.(Defendant No.1 in the Suit).

8. The Respondent No.2 has been leased the land on which the Plaintiff claims to have a premises by putting up a tarpolene over wooden posts. There are certain documents executed by and between MHADA , Respondent No.1 and Respondent No.2.

9. The main aspect to be considered is the extent of the Appellant's right in suit premises. When the Appellant came to be in the possession of the premises and through whom is not stated. Lawful entry into the premises is, therefore, not shown. The Appellant may be taken to be in settled position if he shows his possession settled prior to the filing of the suit to claim his rights to the suit premises.

10. It is the case of the Appellant/Plaintiff himself that his premises were demolished at least on three occasions 1998, 2000 and 2001 and, therefore, some of the documents have been destroyed. No copies of the documents are produced. The Appellant's Advocate stated across the Bar that he had some electricity bills which were destroyed. No further electricity bills were produced. Even if some were destroyed, further bills could have been shown. None of such documents have even been produced in the trial Court. The Appellant's business is not licensed. The case for possession of immovable property is essentially based on the documentary evidence. No Plaintiff who maintains an action in law for protection of immovable property can, by oral evidence, state that he was in possession. Such case and such statement has necessarily to be substantiated by documentary evidence. None is produced in this litigation.

11. The right to claim a prohibitory injunction for protection of a possession is based upon such documentary evidence. The right to claim a mandatory injunction, upon showing that the demolition by a Municipal or Government Authority is illegal, can also be maintained only upon producing documentary evidence.

12. In the absence of any such documentary evidence it has

to be seen how the learned Judge has considered the Plaintiff's case in the Judgment which is impugned in this Appeal.

13. The affidavit of examination-in-chief of the Appellant is produced. It shows the deposition of the Appellant leaving the exhibits numbers blank. The exhibit numbers have been put in ink. The Appellant's Advocate states that these were the exhibit numbers given by the learned trial Judge. How the admissibility of the documents is considered is not shown. Nevertheless those documents of the Appellant as the Plaintiff in this suit can themselves be considered on merits as has been considered by the learned trial Judge himself. For showing possession, the appellant as the plaintiff in the suit as, instead of producing documents of possession sought to produce the letter dated 12th July, 1989 signed by the Tahasildar. The evidence of the Plaintiff shows that by a letter dated 9th May, 1989 the Tahasildar (encroachment) Kurla, Mumbai issued a letter to the Plaintiff asking why his premises should not be removed for violation of the Maharashtra Land Revenue Code, 1966. He fixed hearing on 16th May, 1989. The plaintiff claims to have attended the office of Tahasildar (encroachment) Kurla " and produced necessary records", which were verified by the Tahasildar and after which a letter dated 12th July, 1989

came to be issued by the Tahasildar to the Appellant showing that he had verified that suit premises was in possession prior to 1980 and that he was the exclusive owner of the suit structure and in exclusive possession thereof. The letter is stated to have been marked Exhibit-11. The Tahasildar who signed the letter has not been examined. How the letter came to be issued in the normal course of conduct by the Tahasildar as the Government Officer has not been shown. The letter shows that the Appellant is the owner of the structure admeasuring 240 sq. ft. used as a garage. The documents that the Appellant produced before the Tahasildar is not reflected in the letter and not produced by the Appellant separately in the trial. In fact they have not been produced by the Appellant in this Appeal though specifically called upon.

14. All that the Appellant produced in the trial is a chit shown as a “Pavti” bearing certain number and his name which is stated to be the receipt upon the survey of the hutments issued by the Tahasildar's Office. The receipt does not bear any reference to the suit structure.

15. The Appellant was extensively cross examined and the void in the case of the appellant is reflected therein.

16. The Appellant examined the Officer of MHADA to prove a letter dated 11th August, 2003 stated to have been issued by MHADA, Respondent No.1. The Officer in his examination-in-chief itself has deposed that his office was not the author of the letter and was not received by his subdivision, and he was not aware of the letter. Consequently he has not been cross examined.

17. The Appellant examined the Deputy Collector (encroachment). In his examination-in-chief he refers to a letter dated 24th October, 2001 issued by the Office of Collector to the Appellant calling upon him to produce documentary evidence in respect of his hut. Thereafter, the office of the Collector issued a letter to the Appellant on 2nd June, 2001 stating that his hut is liable to be protected. That letter is marked Exhibit-14. The Respondent No.1 MHADA issued their letter dated 24th September, 2001 calling upon the Collector's Office to explain on what basis the Plaintiff's hut was declared protected. The Collector's Office explained that, that was upon the documents submitted to their office showing that the Plaintiff's hut was existing prior to 1995. The Deputy Collector deposed that, that was the only correspondence with regard to the Plaintiff's hut. The cross examination of that Officer shows that no photo-pass was issued to the Plaintiff. The witness did not even know

whether the hut or the structure claimed by the Plaintiff was on Government land. She however, admitted that the plaintiff's structure was earlier demolished.

18. This is the sum total of the Plaintiff's evidence. The Appellant as the plaintiff failed to produce any document himself. There are two letters; one of the Tahasildar and one of the Deputy Collector stating that the plaintiff's hut is liable to be protected as per the documentary evidence produced by the Plaintiff. Even those two Government officers who deposed on behalf of the plaintiff failed to produce any files or Government records showing how the letters came to be issued and upon which documents those letters would be substantiated. The worth of the evidence of Government Officers issuing letters to citizens about how structures are liable to be protected and how the citizens can obtain letters from such Government Offices is writ large and apparent from such correspondence bereft of the accompanying documentary evidence.

19. In a Court of Law the party who maintains an action bears the onus of proving his claim. The action which can be maintained for protection of the structure or for the consequential relief of reconstruction of the structure upon its illegal demolition is necessarily to be based upon the

documentary evidence and not letters issued by Government Officers who are shown to have considered the documentary evidence without producing such documentary evidence in Court itself to justify the letters issued by Government Officers. No claim can be based upon letters issued by Government Officers alone.

20. Such is the case of the Appellant/Plaintiff. It has been examined by the learned trial Judge in the right light. The evidence has been rejected by the learned trial Judge correctly.

21. The Deputy Engineer of MHADA, Respondent No.1 has been examined as D.W.3. He has deposed that on 18th November, 1998, 8th December, 1998 and 16th May, 2001 MHADA "dismantled" the construction of garage near the office building no.11 of MHADA . They have taken photographs of the demolition and made their reports. They have produced their record before the trial Court. The said record has been produced before this Court also.

22. The record shows the demolition/dismantling made on 18th November, 1998, the office noted date 19th November, 1998. The internal correspondence between the Deputy Engineer and Engineer on 20th November, 1998. The similar

exercise was undertaken on 16th May, 2001.

23. The learned trial Judge has considered the action of MHADA at length. The learned Judge has considered the evidence on behalf of MHADA and the dismantling which took place on the aforesaid 3 days. He has also considered the lease agreement executed by MHADA with Respondent No.2 (Defendant No.2 in the Suit). The learned Judge has gone through the file maintained by the MHADA showing such demolition/dismantling and has concluded how it was crystal clear that the suit structure was demolished on 18th November, 1998 as well as on 16th May, 2001 by MHADA who are admittedly the owners of the open land below whatever was the construction put up by the Appellant (plaintiff in the Suit).

24. It may be mentioned that the present construction for which this appeal has been filed is for an open land on which work of repair of scooters is seen to be undertaken. It only has a tarpolene roof on bamboo poles which are tied to the walls of the two adjacent structures. The front as well as the rear side are lying open. MHADA would be required to "dismantle" rather than "demolish" such user of the land.

25. The Appellant has not shown his lawful possession in

any lawful structure constructed by him under any lawful authority for which he can maintain an action in law. The dismantling or even demolishing which has been carried on by MHADA is on its own land in respect of a rank trespasser who is not shown to have produced any documents showing his possession, before MHADA. The Appellant, therefore, cannot maintain inaction in law. As such his Suit is rightly dismissed.

26. The Appeal, therefore, cannot be maintained.

27. The Appeal is dismissed.

28. The interim injunction which continued pending the appeal is therefore, vacated.

29. Three photographs produced by the Appellant and signed by the Appellant's Advocate are kept on record. Two other photographs produced by the Appellant and signed by the Appellant's Advocate are handed over to the Advocate for Respondent No.2 for the sake of record.

30. On the application of the Appellant's Advocate for protection of the possession of the Appellant which has been protected until today, the ad-interim order passed in this

Appeal shall continue for a period of 6 weeks.

(SMT. ROSHAN DALVI, J.)